PART 6218

CIVIL ENFORCEMENT HEARINGS

(Statutory authority: Election Law, §§ 3-102, 3-104)

Section

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Notice of Adoption
Part 6218, Title 9 Subtitle V
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Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended by adding a new Part 6218, to read as follows:

Part 6218 Civil Enforcement Hearings.

Section 6218.01 Applicability. This Part shall apply to civil enforcement proceedings as provided for by section 3-104 of the Election Law. It is the intent and purpose of these rules to provide a fair and efficient process of civil enforcement that ensures due process of law in all administrative adjudicatory proceedings.

Section 6218.02 Hearing Officers; generally. (a) Adjudicatory proceedings shall be presided over by a Hearing Officer. (b) Hearing Officers shall be appointed by majority vote of the State Board pursuant to section 3-104 of the Election Law. (c) Hearing Officers shall be duly admitted to practice law in New York in good standing and shall possess such other qualifications as the State Board may require. (d) A Hearing Officer shall be assigned randomly to a particular enforcement matter in accordance with section 3-104 of the Election Law. Such random assignment process shall be administered by the co-executive directors or their designees and shall occur upon each request by the Chief Enforcement Counsel. For each assignment request, all approved Hearing Officers shall be randomly listed, and the assignment shall be offered in the order of the list until an available Hearing Officer shall accept the assignment. (e) Hearing Officers shall exercise, to the extent consistent with the Election Law and the Rules, Regulations and Opinions of the State Board, the powers and obligations of presiding officers as defined by the State Administrative Procedure Act (SAPA), in addition to such other powers and obligations as the Election Law and this Part shall provide. (f) A Hearing Officer's remuneration, working conditions case assignments, discipline or removal, shall not be based in any way on

how a Hearing Officer's rulings, decisions or other actions favor or disfavor any party. There shall not be established any quotas or similar expectations for any Hearing Officer that relate in any way to how the Hearing Officer's rulings, decisions or other actions favor or disfavor the Chief Enforcement Counsel of the State Board or any other party. (g) In any pending adjudicatory proceeding, the Hearing Officer may not be ordered or otherwise directed to make any particular finding of fact, to reach any particular conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue by any party or other person. (h) Unless otherwise authorized by law, a Hearing Officer shall not communicate in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before such officer with any person except upon notice and opportunity for all parties to participate. A Hearing Officer may, however, communicate with staff of the State Board as expressly permitted by subdivision two of section 307 of the State Administrative Procedure Act. (i) A Hearing Officer shall not participate in any proceeding to which he or she is a party; in which he or she has been attorney, counsel or representative; in which he or she is interested; or if he or she is related by consanguinity or affinity to any party to the controversy. A Hearing Officer shall recuse him or herself from any case in which he or she believes that there is, or there may be perceived to be, a conflict of interest or colorable question as to his or her impartiality.

Section 6218.03 Commencement of Election Law 3-104 proceedings. (a) Adjudicatory proceedings pursuant to section 3-104 of the Election Law shall be commenced when the Chief Enforcement Counsel requests the assignment of a Hearing Officer, serves a Notice of Hearing and the Report of the Chief Enforcement Counsel ("Report") upon the respondents and provides the Report to the assigned Hearing Officer. The Report, which is also the Complaint initiating the adjudicatory process, shall consist of: (1) a statement of the legal authority and jurisdiction under which the proceeding is to be held; (2) a reference to the particular sections of the statutes, rules , regulations or opinions of the State Board involved; (3) a plain and concise statement of the facts constituting the alleged unlawful violation of the Election Law; (4) a statement pursuant

to 3-104 of the Election Law as to whether substantial reason exists to believe a violation of the Election Law has occurred and, if so, the nature of the violation and any applicable penalty, based on the nature of the violation; whether the matter should be resolved extra-judicially; and whether a special proceeding should be commenced in the supreme court to recover a civil penalty; (5) a statement that interpreter services are available if needed. (b) The Notice of Hearing shall provide the respondent at least twenty (20) days from the date of service in which to file a written Answer to the Report. The Notice of Hearing shall state that an in-person hearing date and time will be set by the Hearing Officer only if such a hearing is requested in the written Answer. The Notice of Hearing shall state failure to answer shall constitute a waiver of respondent's right to an administrative in-person hearing pursuant to this part. (c) The Report shall be served by personal service consistent with the Civil Practice Law and Rules or by certified mail. When by certified mail, service shall be complete when the notice of hearing and report are received by respondent. (d) Respondent may, at his or her option, serve an Answer within twenty days after service of the Notice of hearing and Report, denying such report of charges and interposing affirmative defenses, if any. If the respondent shall fail to answer, all charges in the report shall be deemed denied, and the Hearing Officers shall proceed to consider the Report without conducting an in-person administrative hearing. The Chief Enforcement Counsel, on notice to the Hearing Officer, may consent to an extension of time for respondent to answer the Report of the Chief Enforcement Counsel. If the Chief Enforcement Officer denies the request for an extension, the Hearing Officer may grant such extension for good cause shown. (e) The Hearing Officer shall, if an in-person hearing is requested in the Answer, notify the respondent of the date and time of the hearing by mail and, if provided, email. The date of the hearing shall be not less than ten business days after the receipt of the Answer. If the time to Answer has passed and no Answer was served, the Hearing Officer shall thereafter review and consider the Report of the Chief Enforcement Counsel as if all of the accusations therein had been denied by the respondent and make findings of fact and conclusions of law as required by this Part.

Section 6218.04 Conduct of adjudicatory proceedings. (a) The Hearing Officer assigned shall set the time at which a hearing shall be held, and shall grant or deny adjournments or continuations thereof. To the extent practicable, adjournments shall be scheduled by the Hearing Officer upon consultation with all participants. Notices of adjournment or continuation shall be transmitted directly to the parties by the Hearing Officer. (b) All adjudicatory proceedings will be conducted in accordance with the State Administrative Procedure Act, the Election Law, rules, regulations and opinions of the State Board and all other applicable legal authority. Such law, regulations, opinions and authority shall, as relevant, be binding on all determinations and findings of the Hearing Officer. In all instances, due process of law will be observed, including the creation of a transcription of any hearing. (c) A respondent may request the Hearing Officer to direct the Chief Enforcement Counsel to provide a more definite statement or particularization of an alleged violation in the Report of the Chief Enforcement Counsel. If the Hearing Officer determines such request is reasonable, the Hearing Officer shall direct the Chief Enforcement Counsel to provide a more definite statement within a reasonable time frame. (d) The Hearing Officer shall make findings of fact and conclusions of law based on a preponderance of the evidence as to whether a violation has been established and, if so, who is guilty of such violation on notice to and with an opportunity for the individual or entity accused of any violations to be heard. However, if the Hearing Officer finds that on balance, the equities favor a dismissal of the complaint, the Hearing Officer shall dismiss the charges. In determining whether the equities favor a dismissal, the Hearing Officer shall consider the following factors: (1) whether the complaint alleges a de minimis violation(s) of article fourteen of the Election Law; (2) whether the subject of the complaint has made a good faith effort to correct the violation; and (3) whether the subject of the complaint has a history of similar violations. For purposes of making any such findings, proceedings before the Hearing Officer shall be governed by article three of the state administrative procedure act and shall be made on a fair, equitable and uniform basis without regard to the status of the individual who is the subject of the Report. (e) Any party may submit proposed findings of fact within time

limitations set by the Hearing Officer. Such findings of fact shall be captioned, titled as such, shall be consecutively numbered and shall be typed legibly on plain, white bond, standard weight paper, 8½ x 11 inches in size. Such proposed findings of fact shall recite basic facts and not evidentiary facts and shall not be conclusions of law. A basic fact would be "John Jones visited Syracuse," and not "John Jones testified that he visited Syracuse," which is an evidentiary fact. A conclusion of law would be "John Jones has demonstrated untrustworthiness within the meaning of section 441-c of the Real Property Law." In general, it is expected that the complaint will allege the basic facts which would otherwise be contained in a statement of proposed findings of fact. In accordance with section 307(1) of the State Administrative Procedure Act, the person assigned to render a decision will rule on each finding of fact. Such decision maker will do so by marking the instrument setting forth the proposed findings of fact a part of the decision and noting in the margin thereof the ruling, i.e., "Found," "Not Found," "Irrelevant," "Evidentiary," "Conclusion of Law," which rulings may be abbreviated meaningfully. The body of the decision will contain such findings of fact as the decision maker deems relevant, but need not be expressed in the same language as presented in the proposed findings. (f) The Chief Enforcement Counsel shall adopt the report of the Hearing Officer and may, in his or her discretion, commence a special proceeding in the supreme court pursuant to sections 16–100, 16–114 or 16–116 of the Election Law should the findings of fact and conclusions of law provide a basis for the commencement of such proceeding or enter into an agreement to settle such matter with the subject of the complaint.

Section 6218.05 Scope and time of settlement. The Chief Enforcement Counsel may, in the exercise of discretion, enter into settlement agreements with willing respondents, provided such provisions are not contrary to law or the rules, regulations and relevant formal or advisory opinions of the State Board. Settlement agreements shall be entered into on a fair, equitable and uniform basis without regard to the status of the respondent who is the subject of the Report. If a settlement agreement is entered into before the Hearing

Officer makes findings of fact, such settlement agreement shall, in accordance with its terms and conditions, constitute a final administrative disposition of the adjudicatory proceeding.

Section 6218.06 Affidavits. When a verified statement is required or deemed desirable by any party, it shall be sufficient for the deponent to subscribe a statement at the end thereof that the "foregoing statement is affirmed under penalties of perjury." A statement verified before a notary public will be equally acceptable.

Section 6218.07 Evidence and proof. The strict rules of evidence do not apply to administrative proceedings under this Part.

Section 6218.08 Service of rules. Every notice of hearing served shall be served with a copy of these rules, a plain language summary of these rules, a copy of articles 3, 4 and 5 of the State Administrative Procedure Act and relevant definitions under section 102 of the State Administrative Procedure Act.

Section 6218.09 Representation. (a) Every party shall be accorded the right to appear in person or by or with counsel, at his or her own expense. (b) Any person compelled to appear or who voluntarily appears before a Hearing Officer as a witness shall be accorded the right to be accompanied, represented and advised by counsel, at his or her own expense.

Section 6218.10 Adjournments. (a) To the extent practicable requests for adjournment must be made by written affidavit addressed to the Hearing Officer, and must be received at the office of the State Board no later than three business days prior to the scheduled date of hearing. The affidavit must contain sufficient details to explain the reason for the request so as to enable the Hearing Officer to rule thereon. (b) The first request of any party to adjourn an adjudicatory hearing will be granted by the Hearing Officer for good cause shown, and any subsequent adjournment requests of such party will be granted by the Hearing Officer if necessary to avoid real prejudice to the requesting party.

Section 6218.11 Discovery and Subpoenas. If a party requires a subpoena to produce a witness or necessary materials for the specific purpose of an adjudicatory hearing conducted pursuant to this Part, an application for a subpoena may be made to the Hearing Officer and, upon good cause shown, shall be issued by the Hearing Officer as provided for by the State Administrative Procedure Law. An application to the Hearing Officer for the issuance of a subpoena shall be made on notice to all parties and to the Co-Counsels of the State Board. To ensure that an application for a subpoena by the chief enforcement counsel to the Hearing Officer shall not result in derogation of the powers reserved by to the State Board pursuant to subdivision 3 of section 3-104 of the Election Law, such a subpoena shall be narrowly drawn to meet the needs of the adjudicatory process and shall not be speculative or investigatory.

Section 6218.12 Time periods. (a) Except by consent of the parties, every adjudicatory proceeding under this Part shall be brought to completion by the issuance of the Hearing Officer's findings of fact and conclusions of law within 90 days after, as applicable, (1) the date of the hearing, or (2) if no hearing was held, the date the Answer was served, or (3) if no Answer is served, the date the Answer was due. (b) A failure of the Hearing Officer to observe the time limitations established by this section shall be reviewable under article 78 of the Civil Practice Law and Rules in a proceeding in the nature of mandamus.